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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 118

EZRA TAFT BENSON, Secretary of Agriculture
of the United States,
Petitioner,

VERSUS

PRODUCERS LIVESTOCK MARKETING ASSOCIATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF OKLAHOMA LIVESTOCK MARKETING ASSOCIATION, NATIONAL LIVESTOCK COMMISSION COMPANY, AND NATIONAL FEEDER SERVICE CORPORATION, AMICUS CURIAE

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October, 1957.

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PRELIMINARY STATEMENT

This brief is filed with the consent of the petitioner and the respondent, appearing in the appendix hereto, pursuant to paragraph two of rule 42 of this Court. It is filed in support of the position of the respondent, Producers Livestock Marketing Association.

The Oklahoma Live Stock Marketing Association is a nonprofit co-operative marketing association with some 27,000 members, with its principal office and place of busi-

ness at Oklahoma City in the State of Oklahoma. The National Livestock Commission Company is a wholly owned subsidiary corporation of the Oklahoma Live Stock Marketing Association, organized and existing under the laws of the State of Oklahoma, and with principal office and place of business at Oklahoma City, Oklahoma. The National Feeder Service Corporation is likewise a wholly owned subsidiary of the Oklahoma Live Stock Marketing Association, organized and existing under the laws of the State of Oklahoma, and with principal office and place of business at Oklahoma City, Oklahoma. All of said companies are engaged in the marketing of livestock through the facilities of the stock yards at Oklahoma City, Oklahoma; the National Livestock Commission Company operating strictly on a commission basis and the National Feeder Service Corporation as a trader on said market; and said companies likewise handle many transactions where cattle are bought or sold direct from producers to feeder buyers throughout the United States. It is the belief of these companies that the regulation promulgated by the Denver Union Stockyards Company and involved in this appeal is unjust, unreasonable, and discriminatory and, therefore, not authorized by law and that if it shall be permitted to stand, probably every stockyards company in the nation will follow the precedent thus established and will issue similar regulations which will result in great injury, damage and loss to the livestock industry throughout the entire nation.

We believe that the judgment of the United States Court of Appeals of the Tenth Circuit is correct and that it should be affirmed by this Court, and this brief is filed in

the hope that it may aid the Court in reaching a fair, just and correct decision of the all important and far reaching questions presented by this appeal.

STATEMENT OF CASE

This case is here on certiorari to reverse the judgment of the United States Court of Appeals of the Tenth Circuit in Case No. 5459 in that Court reversing the order of Ezra Taft Benson, Secretary of Agriculture, in a proceeding under the Packers and Stockyards Act of 1921 as amended (7 U.S.C.A., Sec. 181 *et seq.*) between Producers Livestock Marketing Association of Salt Lake City, Utah, complainant, and Denver Union Stockyard Company of Denver, Colorado, respondent; and for the sake of brevity and to avoid needless repetition, we refer to the statement of the case contained in the brief of the respondent herein, Producers Livestock Marketing Association, and adopt the same as full as though reiterated in this brief. The findings and judgment sought to be reversed here appear in the Transcript at pages 77 to 84, inclusive.

It seems to us that the primary question presented to the Court by this appeal is whether or not the regulation promulgated by the Denver Union Stockyard Company and involved herein is invalid on its face as a matter of law. The pertinent portions of the regulation here involved read as follows:

> "(c) No market agency or dealer engaging in business at this stockyard shall, upon stockyard company property, or elsewhere, nor shall any other person upon stockyard company property:

(1) Solicit any business for other markets, for sale at outside feed yards, or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or

(2) In any manner divert or attempt to divert livestock from this market which would otherwise normally come to this stockyard; or

(3) Engage in any practice or device which would impair or interfere with the normal flow of livestock to the public market at this stockyard."

To answer the foregoing primary question we think it was necessary for the Court of Appeals: (1) To determine that the Producers Livestock Marketing Association was a marketing agency and that the Denver Union Stockyard Company was a stockyards company within the meaning of the Packers and Stockyards Act. This is admitted by the pleadings. (2) That it have before it the regulation involved. This too was contained in the pleadings. That is to say that both the status of the parties and the regulation to be construed were admitted in the pleadings. (3) It only remained for the Court to apply the Packers and Stockyards Act and other applicable provisions of the law to this admitted situation. This was purely a question of law and no further evidence was necessary. This was the view of the United States Circuit Court of Appeals and we believe that it is correct and that it should be affirmed.

ARGUMENT AND AUTHORITIES

We will discuss the legal questions which we deem decisive of the issues in this case under the following propositions:

(1) The regulation promulgated by the Denver Union Stockyard Company is unjust, unreasonable and discriminatory and clearly violates regulatory, statutory provisions of the Packers and Stockyards Act.

(2) The Denver Union Stockyard Company is a public utility and as such is bound to furnish its facilities, upon reasonable request and without discrimination.

(3) The regulation is monopolistic and in restraint of trade and therefore void.

(4) This appeal presents for decision a pure question of law.

Proposition 1.

The Regulation promulgated by the Denver Union Stockyard Company is unjust, unreasonable, and discriminatory and clearly violates regulatory, statutory provisions of the Packers and Stockyards Act.

Title 7, U.S.C.A. 124, Sec. 202, defines stockyards. Subdivision (a) of this section reads as follows:

"When used in sections 201-203 and 205-217a of this title the term 'stockyard' means any place, establishment, or facility commonly known as stockyards, conducted or operated for compensation or profit as a public market, consisting of pens or other inclosures and their appurtenances, in which live cattle, sheep, swine, horses, mules or goats are received, held or kept

for sale or shipment in commerce. Said sections shal not apply to a stockyard of which the area normally available for handling livestock, exclusive of runs alleys, or passageways, is less than twenty thousand square feet."

Title 7, U.S.C.A. 123, Sec. 210, defines stockyard owner stockyard services, market agency and dealer. This section reads as follows:

"When used in this chapter—

"(a) The term 'stockyard owner' means any person engaged in the business of conducting or operating a stockyard;

"(b) The term 'stockyard services' means services or facilities furnished at a stockyard in connection with the receiving, buying or selling on a commission basis or otherwise, marketing, feeding or handling in commerce or livestock;

"(c) The term 'market agency' means any person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services; and

"(d) The term 'dealer' means any person, not a market agency, engaged in the business of buying or selling in commerce livestock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser. Aug. 15, 1921, c. 64, Sec. 301, 42 Stat. 163."

It is not questioned that the Denver Union Stockyard Company owns and operates a stockyard within the statutory definition quoted above.

The pertinent portions of Title 7, U.S.C.A. 128, Sec. 205, reads as follows:

"It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard."

Then follows Section 206 of the same title which deals specifically with rates and provides that the rates charged shall be just, reasonable, and nondiscriminatory, and further provides that any violation of this provision shall be unlawful. This particular section, while not involved here, is pertinent as showing the general purpose to condemn any discriminatory act on the part of stockyards operators.

Title 7, U.S.C.A. 136, Sec. 208, and the pertinent portions of Section 211 of the same title contain the following provisions:

"It shall be the duty of every stockyard owner and market agency to establish, observe and enforce, *just, reasonable, and nondiscriminatory regulations and practices* in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful. Aug. 15, 1921, c. 64, Sec 307, 42 Stat. 165.

"Whenever after full hearing upon a complaint made as provided in Section 210 of this title, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the secretary is of the opinion that any rate, charge, *regulation, or practice* of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

"(a) May determine and prescribe what will be *just, reasonable* rate or charge, or rates or charges, to be thereafter in such case observed as both the maximum and minimum to be charged, and what regulation or practice is or will be *just, reasonable and nondiscriminatory* to be thereafter followed; and

"(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any more or less than the rate or charge so prescribed; and (3) shall conform to and observe the regulation or practice so prescribed. Aug. 15, 1921, c. 64, Sec. 310, 42 Stat. 166; Aug. 10, 1931, c. 663, 53 Stat. 1351."

We have taken the liberty of italicizing the words, "just, reasonable and nondiscriminatory regulations and practices" in Section 208 and "regulations or practices" in Section 211 as we do not think that the regulations or practices promulgated by the Denver Union Stockyard Company and here involved are either just, reasonable or nondiscriminatory within the purview and meaning of said sections.

The sections of the statute quoted *supra* stress over and over again that the regulations promulgated by stockyards companies must be *just, reasonable and nondiscriminatory*, and when we measure the regulation here under consideration by this yardstick, it is very clear on its face that it violates these provisions of the law. Suppose, for instance, that any commission company doing business on the Denver stockyards knows of a feeder over in Illinois to whom he can sell cattle from ranges in Colorado, *or elsewhere*. What

happens to him if he makes such a sale? Under this regulation his right to do business over the Denver stockyards or to use the facilities of those stockyards would be immediately terminated, while the commission company which bowed the knee and funneled all of its transactions through the Denver stockyards would pay no such penalty. If a commission firm doing business and using the facilities of the Denver Union Stockyards should ever solicit one of its clients to sell his cattle direct to a feeder in Illinois or some other state, his right to do business on those yards would be immediately terminated. Such a regulation not only affects the commission firm itself, but it is well known that the most profitable sales to the producer are those which he makes direct through a commission firm to a feeder without incurring the expense and the loss of weight necessary to funnel them through stockyards and from thence to a feeder. This regulation would practically deprive him of that outlet because no commission firm would dare to attempt to make a sale direct from him to the feeder, knowing that if its activities in that line should be discovered, its business would be wrecked and destroyed by having its right to transact business on its local yards cancelled.

Can it even be contended that a regulation so iniquitous as this is fair, or just or reasonable? We think not. And the unfortunate thing is that if the Denver Union Stockyard Company can get away with it, then every stockyard in the nation can do the same thing, and the great nation-wide market from the producer direct to the feeder will have received a body blow.

In the case of *E. H. Birmingham, App.* v. *Rice Brothers*, 2 A.L.R.2d 1108, paragraph four of the syllabus reads as follows:

> "The duties imposed by the Federal Packers and Stockyards Act upon stockyard owners and marketing agencies are substantially in accord with the common law applicable to public utilities in general."

In the body of the opinion, on page 1117, the following language will be found:

> "The conduct prohibited is always *unjust* discrimination, *unfair* rates or practices or *unreasonable* rules."

We have italicized the words "unjust, unfair and unreasonable" as they appear in the above paragraph because they are italicized in that opinion.

Is a regulation fair or just or reasonable either to the offending commission firm, or to the public, which penalizes a commission firm by depriving it of the right to transact business on a stockyards because it dares to solicit business for its customers which is not to be handled over and through those yards? And indirectly is it fair, or just or reasonable either to the producer or the feeder of livestock to thus deprive them of their God-given right to deal direct without paying tribute to any stockyards company? It was to prevent just such unreasonable regulations that the Packers and Stockyards Act was passed and that power was conferred upon the Secretary of Agriculture to regulate the practices in the stockyards of the nation. In the case of *Sioux City Stock Yards Company* v. *United States*, 40 F. Supp. 801, paragraphs one, three, four and five of the syllabus read as follows:

"1. Congress, by enacting Packers and Stockyards Act, has conferred upon Secretary of Agriculture plenary power to supervise and regulate business of a public stockyard and its market agencies, including all the material incidents and relationships of its marketing processes. Packers and Stockyards Act; Sec. 1 *et seq.* 7 U.S.C.A., Sec. 181, *et seq.*

"3. Evidence justified the Secretary of Agriculture in ordering a stockyards company to desist from enforcing its decision to exclude a commission company from acting as a market agency at the stockyards on ground that the decision was 'discriminatory.' Packers and Stockyards Act, Sec. 301, 304 as amended in 1926, 310, 7 U.S.C.A. Secs. 201, 205 and 211.

"4. The cease and desist order made by Secretary of Agriculture under Packers and Stockyards Act forbidding stockyard company from depriving commission company of continued use of its stockyard facilities was not based on erroneous view of the law by Secretary that he had jurisdiction over every controversy between stockyard owner and market agency regardless of whether it bore any relationship to the market in view of Secretary's complete findings and conclusions. Packers and Stockyards Act as amended, Secs. 301-303, 304, as amended in 1926, 305-316, 7 U.S. C.A. Secs. 201, 205-207.

"5. Secretary of Agriculture was not required to make a specific foundational finding that a market injury was being threatened or would be visited upon buying or shipping public and that a public interest was therefore involved before making a cease and desist order under Packers and Stockyards Act forbidding stockyard company from depriving commission company, as an operator or an established livestock commission business at stockyard company's stockyards, of continued use of its facilities. Packers and Stock-

yards Act as amended, Secs. 301-303, 304, as amended, 305-316, 7 U.S.C.A. secs. 201-203, 205-217."

To the same effect is the case of *Kirk* v. *St. Joseph Stock Yards Company*, 206 F.2d 283, by the United States Court of Appeals, Eighth Circuit. Paragraphs three, four and five of the syllabus of this case read as follows:

"3. Commercial stockyard is a 'public utility' subject to reasonable regulations. Packers and Stockyards Act of 1921, Sec. 310 *et seq.*, as amended, 7 U.S.C.A., Sec. 201 *et seq.*

"4. Commercial stockyard owner and operator had the duty of furnishing, upon reasonable request and without discrimination, reasonable stockyard service and of establishing, observing, and enforcing just, reasonable and nondiscriminatory regulations and practices in respect to furnishing of stockyard service. Packers and Stockyards Act of 1921, Sec. 310 *et seq.*, as amended, 7 U.S.C.A. Sec. 201 *et seq.*

"5. Commercial stockyards, as public utility, cannot escape liability for failure to furnish, without discrimination, reasonable stockyards service or for negligence in connection with such service by delegating to others duty to perform such service. Packers and Stockyards Act of 1921, Sec. 301 *et seq.*, as amended, 7 U.S.C.A. Sec. 201, *et seq.*"

In the late case of *United States* v. *O'Rourke*, 116 F. Supp. 857, in paragraph one of the syllabus it was held that the primary purpose of the Packers and Stockyards Act was to insure without discrimination reasonable stockyards services, reasonable and nondiscriminatory rates, and to eliminate unjust and discriminatory practices. This paragraph reads as follows:

"Purpose of Packers and Stockyards Act is to insure, without discrimination, reasonable stockyards and services, reasonable and nondiscriminatory rates, and the elimination of unjust or discriminatory practices. Packers and Stockholders Act of 1921, 1 *et seq.*, as amended, 7 U.S.C.A. 181 *et seq.*"

In the case of *Birmingham* v. *Rice Brothers*, cited and quoted *supra*, certiorari was denied by this Court. See 332 U.S. 768, 92 L. Ed. 353 and 332 U.S. 820, 92 L. Ed. 397.

Both the statutory provisions quoted *supra* and the above decisions construing the same lay special emphasis upon the proposition that all regulations and practices of a stockyards company, if they are to be permitted and given effect, must be fair, and reasonable, and nondiscriminatory; and we respectfully submit that the regulation here involved is neither fair, nor reasonable nor nondiscriminatory. On the contrary, it is unjust, unreasonable and discriminatory, and if established as a general practice throughout the stockyards of the nation, as it will be if the regulation of the Denver Union Stockyard Company here involved shall be upheld, it will prove injurious not only to the commission firms and other marketing organizations which must use the facilities of those yards, but it would strike a body blow to the stocker and feeder business of the entire nation.

Proposition 2.

The Denver Union Stockyard Company is a public utility and as such is bound to furnish its facilities upon reasonable request and without discrimination.

We think that the proposition that a stockyards company is a public utility and that as such it is subject to reasonable regulations under the Packers and Stockyards Act

and that it must furnish its facilities upon reasonable request and without discrimination, can no longer be questioned. Paragraph 3 of the syllabus of the case of *Kirk v. St. Joseph Stock Yard Company*, 206 P.2d 283, specifically so holds. This paragraph reads as follows:

> "Commercial stockyard as a 'public utility' subject to reasonable regulations. Packers and Stockyards Act of 1921, 301 *et seq.*, as amended, 7 U.S.C.A., 201 *et seq.*"

In the case of *Nashville Union Stock Yard Company v. Grissom*, 280 S.W. 1015, it was specifically held that this section required stockyard companies to furnish services to all dealing in livestock on its premises, on reasonable request and without discrimination.

In the case of *Birmingham v. Rice Brothers*, 2 A.L.R. 2d 1108, *certiorari denied*, 92 L. Ed. 95, it was specifically held that the conduct prohibited to a public utility includes ways *unjust* discrimination, *unfair* rates or practices, and *unreasonable* rules. The law on this point is so thoroughly settled that no purpose will be served by the citation of further authority. This being true it only remains to measure by this yardstick the regulation promulgated by the Denver Union Stockyard Company. Is it just, reasonable and nondiscriminatory? We do not think that it is either just, reasonable, or nondiscriminatory.

For instance, it would apply one rule to the firm which transacts all of its business on the Denver yards and funnels all of its livestock through those yards, while it would apply an entirely different rule to the firm which was licensed to do business on those yards but which bought cattle in the country for its customers and shipped them di-

rect to a feeder or to some other market without funneling them through the Denver yards and paying tribute to the Denver Union Stockyard Company.

The very purpose and the only purpose of such a regulation is to force all livestock to move through those yards thereby establishing a monopoly over the handling of livestock in that area and collecting tribute on every animal.

The firm which does no country business and whose only business is conducted on the Denver yards would not be hurt by the regulation, while the firm whose business consists largely of buying in the country and shipping direct to the feeder trade could easily be ruined by it. Such a firm would be deprived of its right to do business on the Denver yards if it dared to serve its customers and to save them money by disobeying this unjust, unfair, unreasonable and discriminatory regulation by shipping direct to the buyer. If a regulation which operates in this manner is either fair, reasonable or nondiscriminatory, then we can hardly conceive of one which would be discriminatory. In the case of *Farmer's Livestock Commission Company et al. v. United States, et al.*, 54 F.2d 375, paragraph 2 of the syllabus reads as follows:

> "Individual refusal of person furnishing stockyards services to deal with co-operative producers' and buyers' organizations constitutes violation of statute prohibiting discriminatory practices. (Packers and Stockyards Act, 307, 7 U.S.C.A. 208.)"

What is the difference in principle between a regulation which would deprive a company of the right to do business on a stockyards because it was a co-operative, and one which would deprive a company of the right to do

business because it made some shipments direct to its customers without funneling them through the stockyards, while permitting other companies to transact business who did route their shipments through the yards? We respectfully submit that there is no distinction.

Proposition 3.

The Regulation is monopolistic and in restraint of trade and therefore void.

We think it only necessary to quote again the pertinent portions of the regulation under consideration to show that its sole and only purpose is to monopolize business by compelling all firms or individuals who are engaged in doing business on the yards of the Denver Union Stockyard Company to funnel all their shipments through its yards as a condition precedent to being permitted to transact business thereon. We quote again the particular portions of the regulation which disclose this purpose:

> "(c) No market agency or dealer engaging in business at this stockyard shall, upon stockyard company property, or elsewhere, nor shall any other person upon stockyard company property—
>
> (1) Solicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or
>
> (2) In any manner divert or attempt to divert livestock from this market which would otherwise normally come to this stockyards."

To illustrate the actual effect of this regulation a firm licensed to use the facilities of the Denver Union Stockyards

would forfeit the right to do business on those yards if it bought cattle in the country for a customer in the corn belt and shipped them to him direct. To preserve its right to do business it would be obliged to route them in a roundabout way through the Denver yards and pay tribute on them and then forward them to its customer.

This unreasonable regulation would in fact preclude a trader doing business on the Denver yards from either buying or selling any cattle in a great part of the State of Colorado where the transactions would divert the cattle from the Denver Union Stockyards, and this is true whether or not the owner of the cattle would have sent them through those yards even if the deal had not been made.

It is only necessary to point out the effect of the enforcement of this regulation in order to see that it would interfere with the free movement of livestock in commerce, and that it is both monopolistic and in restraint of trade.

In *People ex rel. Perceval v. Public Service Commission*, 163 App. Div. 705, 707, 148 N.Y.S. 583, 585, a public utility company supplying electric current required of those who sought to become its customers an agreement that they should take no electric current from any other company. In awarding a writ compelling the company to supply the needs of an applicant for service, although he also proposed to take electric current at the same place from another company, the Court said:

> "It is, of course, the rule that such a corporation may establish reasonable regulations respecting the use of the service which it proposes to furnish, and each customer requiring the service is called upon to comply with such regulations. In our opinion, however, the

> requirement that a consumer must take all of its electricity from one company, or receive none at all, is not in any proper sense a regulation respecting the use of the service, but is a purely arbitrary attempt on the part of the company to insure to itself a monopoly of furnishing electric current."

What is the difference between a regulation which would require a customer to take all of his electricity from one company or to receive none at all, and a regulation which would require a customer of the Denver Union Stockyard Company to funnel all of his livestock through the yards of that company or forfeit his right to do any business on its yards whatever?

American Jurisprudence, Vol. 43, Section 22, contains the following language:

> "The primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders."

A case very directly in point here is that of *Nashville Union Stock Yards, Inc.* v. *Grissom*, by the Supreme Court of Tennessee, 230 S.W. 1015. In this case the stockyards company contended that it had a right to establish its own rules in regard to what individuals or companies might transact business on its yards and to write down its own rules and regulations as to the terms and conditions under which they could do so. We take the following extracts from the body of the opinion in this case:

> "It is conceded that complainant is subject to and is governed by the provisions of the Packers and Stockyards Act passed by Congress in 1921 (Comp. St. Ann.

Supp. 1923, 8716¼-8716¼z; Fed Stat. Ann. 1921. Supp. pp. 287-301).

"The validity of this act was upheld in *Stafford* v. *Wallace*, 42 S. Ct. 397, 285 U.S. 513, 66 L. Ed. 735, 23 A.L.R. 229. It regulates the business of packers done in interstate commerce, and forbids them to engage in unfair, discriminatory, or deceptive practices in such commerce, or to subject any person to unreasonable prejudice therein, or to do any of a number of acts to control prices or establish a monopoly in the business of handling, receiving, buying and selling live stock in commerce. It constitutes the Secretary of Agriculture a tribunal to hear complaints and make findings thereon, and to order the packers to cease any forbidden practice. An appeal is given to the Circuit Court of Appeals from these findings and orders * * *.

"(1) As before stated, defendant's answer emphatically and positively denies these general allegations. Furthermore, we fail to find anything in the Packers and Stockyards Act that requires defendant or his employer to transact all of their business of receiving, buying, and selling livestock and causing the same to be shipped to others than complainant. In other words, there is nothing in the act which required J. D. Bolling & Co. or their agent, the defendant, to do all of their business with complainant; and no such contract is alleged in the bill.

"(2) By section 301a of the act complainant is defined as a stockyard owner. By Section 304 of said act it is made the duty of complainant to furnish to those engaged in shipping, buying, selling and handling live stock on its premises upon reasonable request, without discrimination, reasonable stockyard services. This is a duty which the act imposes upon comp' nant, which it is bound to perform and this is tr s to all shippers, buyers, sellers and handlers of live stock

on and through its premises. To this extent it is a public corporation, and these duties cannot be disregarded."

In the case of *Harding Glass Co. v. Twin City Pipe Line Co., et al.*, 39 F.2d 408, paragraph 7 of the syllabus reads as follows:

"Contract requiring glass company to buy gas exclusively from pipe line company as long as it could supply glass company's needs *held* invalid as stifling competition. (Const. Ark. art. 2, 19.)"

Quoting from the body of the opinion in the above case we take the following very pertinent language:

"Whatever tends to prevent competition in business impressed with a public character is opposed to public policy and is therefore unlawful. Greenhood on Public Policy, p. 180.

"Where a contract affects such character of business, since no restraint, however partial, can be tolerated, the court will not inquire into or consider the extent of the restriction imposed. *Gibbs* v. *Consolidated Gas Co.*, 130 U.S. 396, 9 S. Ct. 553, 32 L. Ed. 980; *West Va. T. Co.* v. *Ohio R.P.L. Co.*, 22 W. Va. 600, 46 Am. Rep. 527; *Gwynn* v. *Telephone Co.*, 69 S.C. 434, 48 S.E. 460, 67 L.R.A. 111, 104 Am. St. Rep. 819; *(Central Ohio) Salt Co.* v. *Guthrie*, 35 Ohio St. 672. As to private business, the conduct of which does not affect the public welfare, and hence involves no question of public policy, a different rule applies, under which contracts, if reasonable in their terms, will be enforced.

"Concededly in the instant case the Gas Corporation was engaged in a business impressed with a public character *(Gibbs* v. *Cons. Gas Co., supra)*, and from a reading of the contract it is apparent that its purpose

in making the same was to prevent defendant from discontinuing the use of gas furnished by it, and, in lieu thereof, obtaining a supply from another company engaged in supplying gas to the inhabitants of the city. That the contract was not only in restraint of trade, but if upheld would tend to stifle competition and give plaintiff's assignor a monopoly of the business of furnishing a supply of gas in the city, and hence be detrimental to the public welfare, admits of no controversy.

"In *People ex rel. Perceval* v. *Public Service Commission* 163 App. Div. 705, 707, 148 N.Y.S. 583, 585, a public utility company supplying electric current required of those who sought to become its customers an agreement that they should take no electric current from any other company. In awarding a writ compelling the company to supply the needs of an applicant for service, although he also proposed to take electric current at the same place from another company, the court said:

> "It is, of course, the rule that such a corporation may establish reasonable regulations respecting the use of the service which it proposes to furnish, and each customer requiring the service is called upon to comply with such regulations. In our opinion, however, the requirement that a consumer must take all of its electricity from one company, or receive none at all, is not in any proper sense a regulation respecting the use of the service, but is a purely arbitrary attempt on the part of the company to insure to itself a monopoly of furnishing electric current."

Again we ask, what is the difference in principle between a contract requiring a consumer to buy all of its gas exclusively from a pipeline company and a regulation which requires a commission firm transacting business on

the Denver Union Stockyards to route all of its shipments of livestock through those yards? We submit that from a legal point they are identical, and if the one is monopolistic and in restraint of trade, the other is likewise.

Corpus Juris, Vol. 41, page 85, Sec. 12, in discussing the legal condemnation of monopolies, uses the following language:

> "Monopolies have always been considered odious at common law, inimical to the public welfare, and against public policy. And this is so whether created by governmental grant or by the acts of private parties, persons, or corporations, since the effect on industrial liberty and the price of commodities will be the same irrespective of the method by which the monopoly is created."

The same authority at page 102, Section 55, discussing the purposes of the Sherman Anti-Trust Act uses the following language:

> "The statute was enacted for the purpose of protecting trade and commerce among the several states and the foreign nations from unlawful restraints and monopolies; to prevent undue interference with the free exercise of their rights by those engaged or who wish to engage in trade and commerce—to preserve the right of freedom of trade; to secure equality of opportunity, and to protect the public against evils commonly incident to monopolies and those abnormal contracts and combinations which tend directly to suppress competition."

We respectfully submit that the regulation involved in this case comes within the acts condemned by both the common law and by the anti-trust act and in the case of

International Salt Company v. United States, 332 U.S. 392, 92 L. Ed. 20, the Supreme Court of the United States has held that, "Every contract, combination or arrangement of which the direct purpose, probable effect, or necessary tendency is to stifle or unduly to restrict legitimate competition is unlawful at common law and under the anti-trust statutes."

Proposition 4.

This appeal presents for decision a pure question of law.

The order appealed from appears in the TRANSCRIPT OF RECORD at pages 77 to 84, inclusive, and when read it discloses that it is based wholly upon the legal conclusion that the regulation is invalid on its face as a matter of law. We believe this conclusion to be correct.

It is argued in the amicus curiae brief filed on behalf of the American Stockyards Association that Sections 210 and 211-213 of Title 7, U.S.C.A., require a full hearing by the Secretary of Agriculture on a complaint in regard to a regulation such as that here under consideration and that this would require the taking of evidence, but we respectfully submit that this contention is not well taken.

If the Secretary were acting on his own initiative and there were no admissions in the record, the argument would seem more plausible, but such is not the case. Here it is admitted in the pleadings that the Denver Union Stockyards Company is a stockyard owner rendering stockyard services within the meaning of the Packers and Stockyards Act; that the Producers Livestock Marketing Association is a marketing agency as defined in said act and that it is

doing business on the stockyards of said Denver Union Stockyard Company. These things being admitted, they require no proof.

The regulation complained of was also part of the pleadings; its contents were admitted; it is plain and unequivocal in its terms and requires no evidence to explain it.

The Secretary of Agriculture had before him in the record everything that was essential to enable him to determine the question before him and the introduction of evidence was not necessary to enable him to do so. The same thing was true of the United States Court of Appeals. That the Court so considered is clearly shown by the following extracts from its opinion:

> "It is the position of the stockyard company, adopted at least in part by the Secretary, that the question so raised could not be determined without a 'full hearing' with presentation of evidence on both sides in accordance with Sec. 310 of the Packers and Stockyards Act and the regulations 9 C.F.R. 202.11(a) and 9 C.F.R. 202.2(g). At such a hearing, so says the stockyard company, it intended to and would show that Regulation 10(c) was reasonable and necessary to prevent market agencies in the position of petitioner from undermining the business and public efficiency of the yard by the solicitation of business for other yards.
>
> "Although 9 C.F.R. 202.2(g) defines 'hearing' to be 'that part of the proceeding which involves the submission of evidence', it is fundamental to the law that the submission (fol. 87) of evidence is not required to characterize 'a full hearing' where such evidence is immaterial to the issue to be decided. In construing a similar provision of the Interstate Commerce Act

the Supreme Court has defined a full hearing as one in which ample opportunity is afforded to all parties to make by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint to justice and law, of the step asked to be taken. *Akron, C. & Y. Ry. Co.* v. *United States*, 261 U.S. 184, 43 S. Ct. 270, 67 L. Ed. 605. Where no genuine or material issue of fact is presented the court or administrative body may pass upon the issues of law after according the parties the right of argument. This was done in the instant case and constitutes a 'full hearing' for consideration of the limited contention made by the petitioner in its complaint and by its election not to submit evidence."

In the face of the admissions pointed out *supra*, there can be no question but that the Denver Union Stockyard Company is a "stockyard owner" within the provisions of the Packers and Stockyard Act, quoted *supra*, nor can there be any question that the Producers Livestock Marketing Association is a "marketing agency" or "dealer" operating on said yards within the purview of said act. (7 U.S.C.A., Secs. 201-202.) Likewise, there can be no argument about the provisions of the regulation. They too are admitted and speak for themselves.

As a stockyards owner, the Denver Union Stockyard Company must comply with the portion of 7 U.S.C.A., Sec. 205, which reads as follows:

"It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyards."

It must likewise comply with the provisions of Section 208, which read as follows:

> "It shall be the duty of every stockyard owner and market agency to establish, observe and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable or discriminatory regulation or practice is prohibited and declared to be unlawful. Aug. 15, 1921, 307, 42 Stat. 165."

The question presented is whether the regulation here involved and quoted *supra* in this brief, on its face, violates the provisions of the Packers and Stockyards Act, aforesaid, and the other applicable legal requirements and restraints discussed herein and in the brief of the respondent to which reference is here made.

We believe that on its face the regulation is (a) unjust, (b) unreasonable, and (c) discriminatory; that it is in restraint of trade and tends to create a monopoly, and that the holding of the United States Circuit Court of Appeals should be affirmed.

CONCLUSION

We think that it goes without saying that if this regulation shall be permitted to stand, similar regulations will be adopted by every stockyards company in the nation, and this would affect the entire livestock industry of the nation because it would affect the free movement of livestock through normal channels by funneling them through livestock yards to the profit of those yards and to the detriment of the public as a whole and particularly to the detriment of producers and feeders. It is for this reason that

we have requested and obtained permission to file this brief. We believe that the judgment of the United States Court of Appeals of the Tenth Circuit correctly holds the regulation of the Denver Union Stockyard Company involved herein to be unjust, unreasonable, discriminatory, monopolistic and in restraint of trade, and that it should be affirmed.

Respectfully submitted,

WILLIAM G. DAVISSON,
306-307 Little Building,
Ardmore, Oklahoma,

Attorney for Oklahoma Livestock Marketing Association, National Livestock Commission Company, and National Feeder Service Corporation.

October, 1957.

APPENDIX

October 4, 1957

Mr. William G. Davisson
Attorney at Law
Little Building
Ardmore, Oklahoma

Dear Mr. Davisson:

Re: Ezra Taft Benson, Secretary of Agriculture of the United States vs. Producers Livestock Marketing Association—Supreme Court of the United States —No. 118—October Term, 1957 (Formerly No. 981—October Term, 1956)

In response to your letter of September 25, Respondent, Producers Livestock Marketing Association, hereby consents to the filing of briefs amicus curiae by you in the above case on behalf of your clients, Oklahoma Livestock Marketing Association, National Livestock Commission Company and National Feeder Service Corporation

Yours very truly,

THOMAS AND ARMSTRONG
BY H. P. Thomas

HPT:BC

APPENDIX I

UNITED STATES DEPARTMENT OF AGRICULTURE

Office of the General Counsel

Washington 25, D.C.

July 25, 1957

AIR MAIL

William G. Davisson, Esq.
Little Building
Ardmore, Oklahoma

Dear Mr. Davisson:

This is in reply to your letter of July 22, requesting us, as the attorneys for the Secretary of Agriculture, to consent to the filing of a brief *amicus curiae* in the Supreme Court by the Oklahoma Livestock Marketing Association, the National Livestock Commission Company, and the National Feeder Service Corporation, in the case of *Benson* v. *Producers Livestock Marketing Association*, No. 981, October Term, 1956.

We believe that under the circumstances we should consent to the filing of a brief *amicus curiae* by the Oklahoma Livestock Marketing Association, the National Livestock Commission Company and the National Feeder Service Corporation and accordingly we have executed the form of consent attached to your letter of July 22. In accordance with your request, we are returning to you the executed consent as an attachment to this letter.

With best wishes,

Sincerely yours,

R. L. Farrington
General Counsel

Attachment

[APPENDIX]

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1956.

EZRA TAFT BENSON, Secretary of Agriculture of the United States, Petitioner, v. PRODUCERS LIVESTOCK MARKETING ASSOCIATION, Respondent	No. 981
THE DENVER UNION STOCK YARD COMPANY, Petitioner, v. PRODUCERS LIVESTOCK MARKETING ASSOCIATION, Respondent	No. 917

CONSENT TO FILING OF BRIEF AMICUS CURIAE BY OKLAHOMA LIVESTOCK MARKETING ASSOCIATION, NATIONAL LIVESTOCK COMMISSION COMPANY AND NATIONAL FEEDER SERVICE CORPORATION.

EZRA TAFT BENSON, Secretary of Agriculture of the United States, Petitioner, in Cause No. 981 above hereby consents that OKLAHOMA LIVESTOCK MARKETING ASSOCIATION, NATIONAL LIVESTOCK COMMISSION COMPANY AND NATIONAL FEEDER SERVICE CORPORATION may file a brief *amicus curiae* herein.

NEIL BROOKS

Attorney for Said Petitioner, Ezra Taft Benson, Secretary of Agriculture of the United States.

Dated, July 22, 1957